Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MARATHON OIL COMPANY,

Petitioner,

v.

BRUCE BABBITT, Secretary of the United States Department of the Interior, UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, *et al.*,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner Marathon Oil Company has standing to challenge a decision of the defendants removing certain lands nominated by Marathon from a scheduled oil and gas lease sale, and imposing a wilderness management regime on such lands?

2. Whether the Tenth Circuit Court of Appeals properly interpreted and applied this Court's three-part standing test when it affirmed the district court's holding that a decision in Marathon's favor could not redress Marathon's injury?

LIST OF PARTIES AND CORPORATE AFFILIATIONS

In addition to the petitioner and respondents listed in the caption, the Colorado Environmental Coalition and The Wilderness Society participated in the proceedings before the district court as defendants-intervenors and before the circuit court as appellees-intervenors.

The parent corporation of the petitioner is USX Corporation, and no publicly held company owns 10% or more of the stock of the petitioner.

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Marathon Oil Company ("Marathon") respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not officially rep(ted and is included in the appendix. (App. A at 1a). The opinion of the United States District Court for the District of Colorado is reported at *Marathon v. Babbitt*, 966 F. Supp. 1024 (D. Colo. 1997). (App. B at 6a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on January 6, 1999. Marathon filed a timely petition for rehearing and suggestion for rehearing en banc on February 5, 1999. On March 9, 1999, the Court of Appeals denied the petition for rehearing. (App. C at 11a). This Court has jurisdiction under 28 U.S.C. § 1254(1) (1993 & Supp. 1999).

STATUTORY PROVISIONS INVOLVED

This case raises the issue of the standing of Marathon to bring an action in the federal courts to review an adverse agency decision issued against Marathon. Marathon asserts that the decision is in violation of various provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1785 (1986 & Supp. 1999). (Pertinent portions of this statute are set out in App. D at 13a).

STATEMENT OF THE CASE

A. Course of proceedings and disposition in the courts below.

This petition arises out of an administrative protest filed by Marathon challenging certain actions (described in Section B below) taken by the United States Department of the Interior, Bureau of Land Management (BLM). On January 8, 1997, the BLM issued a final decision denying Marathon's protest. (App. E at 39a). Marathon then filed this action, seeking judicial review of that decision pursuant to 28 U.S.C. §§ 1331, 1361 (1993 & Supp. 1999).

Before the district court the government did not contest the appeal on ripeness grounds. It also conceded that Marathon had been directly injured as a consequence of the decision that Marathon challenged. Instead, it filed a motion to dismiss asserting that Marathon failed to meet the requirements of the "redressability" prong of this Court's three-part standing test. The district court granted the motion and dismissed the action by decision dated June 16, 1997 and reported at *Marathon v. Babbitt*, 966 F. Supp. 1024 (D. Colo. 1997). (App. B at 6a). The Tenth Circuit Court of Appeals affirmed in a non-published decision (App. A at 1a). This petition followed.

B. Factual Background.[1]

In 1976 Congress enacted the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701-1784 (1986

1. The factual assertions set forth in this brief are drawn from Marathon's Complaint, the administrative record filed by the federal defendants with the district court (referred to by bates numbers applied to that record, *e.g.* "BLM0663" or by appendix number as used in the Tenth Circuit proceedings, *e.g.* "Aplt. App. at 113"), and relevant (Cont'd)

& Supp. 1999). Thereafter, the Department of Interior issued a variety of implementing rules and regulations, including those dealing with resource management planning procedures,[2] withdrawal procedures[3] and wilderness inventory and interim management procedures.[4]

In 1980 the Colorado State Office of the BLM completed the wilderness inventory called for by § 603 of FLPMA, 43 U.S.C. § 1782 (1986 & Supp. 1999). The outcome of this inventory was a BLM determination that the lands that ultimately became the subject matter of this lawsuit (located in the Vermillion Basin area of northwest Colorado) were found not to possess wilderness characteristics. Accordingly, BLM did not designate the lands at issue as wilderness study areas nor did it recommend them for ultimate inclusion in the national wilderness system.

After the results of the BLM wilderness inventory were announced, public comments were accepted, hearings were held, final decisions on the various inventory units were announced, and, in some cases, protests were filed and appeals

(Cont'd)
statutes and regulations. Because the district court's decision was issued in response to a motion to dismiss, all well-pleaded factual allegations contained in the Complaint must, at this stage of the proceedings, be presumed to be true. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Similarly, the Court must presume that Marathon's general allegations embrace those specific facts that are necessary to support its claims. *Bennett v. Spear*, 520 U.S. 154, 168 (1997).

2. 43 C.F.R. Part 1600 (1998).

3. 43 C.F.R. Part 2300 (1998).

4. Interim Management Policy and Guidelines for Lands Under Wilderness Review, 48 Fed. Reg. 31,854 (1983) and 44 Fed. Reg. 72,027 (1979).

were pursued concerning the merits of the BLM's decisions. No appeal was filed challenging the BLM's final determination that the lands at issue in this case lacked wilderness characteristics. As these decisions became final, inventoried lands that were determined not to possess wilderness characteristics were freed from interim wilderness management restrictions.[5] These lands were then incorporated into the broader, multiple use, land planning process called for by § 202 of FLPMA, 43 U.S.C. § 1712 (1986 & Supp. 1999).

In 1983 the BLM began preparation of a resource management plan (RMP) and environmental impact statement (EIS) to guide and control future management actions on the public lands in the northwest corner of Colorado. After conducting numerous scientific studies and public hearings, analyzing a wealth of information, preparing drafts, conducting additional hearings and receiving numerous comments from the public and various federal and state agencies, in 1989 the BLM approved an RMP, finalized a Record of Decision (ROD), and issued a Final EIS.

In 1991, at the conclusion of another extensive process of study, public hearings, drafts, comments and further hearings, the BLM formally amended the RMP to incorporate the results of a statewide study of oil and gas leasing and development.

The approved ROD of the amended RMP concluded that "1,878,000 acres of BLM-administered mineral estate within

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5. *See Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 750 (10th Cir. 1982) ("Under Interior's policy, the wilderness review period will result in only a brief hiatus from potential mineral development for most of the lands concerned. Lands containing oil and gas, and of no wilderness value, will be released from the review unharmed and fully suitable for mineral development.")

the Little Snake Resource Area are open to oil and gas leasing and development. . . ." (Aplt. App. at 113).

After 1991, Marathon utilized the results contained in this and many other BLM RMPs to select areas as candidates for geologic study and exploration. The area of northwest Colorado covered by the Little Snake Resources Area RMP had produced oil and gas from shallower formations for decades. The development of new exploration technologies, such as 3-D seismic, made these lands (particularly the deeper horizons) prospective. The federal government owned most of the minerals in the area. Most of the lands had been leased at one time or another in the past. Virtually all of the surface acreage in the area had been thoroughly studied for wilderness, critical habitat, or other restrictive management regimes, and had been released from any restrictions which would adversely affect an oil and gas exploration program.

As a consequence of the results of both its own geologic studies and the approved RMP, in 1996 Marathon determined to conduct a more intensive exploratory program in the area. It acquired leases in the area, and entered into farm-in and other contractual arrangements with existing lessees in the area whereby, in exchange for conducting seismic studies and drilling wells, Marathon could earn interests in the leases. Marathon then conducted a 3-D seismic program and used the results from that program to develop locations for further exploration. Marathon expended over $3.5 million in these exploration activities in the Little Snake Resources Area.

On August 20 and September 5, 1996, Marathon wrote to the BLM to nominate various lands for inclusion within the next scheduled BLM competitive oil and gas lease sale. Pursuant to BLM regulation, 43 C.F.R. § 3120.1-1(e) (1998),

the sending of such expressions of interest is the mechanism that is utilized to trigger BLM review of the nominated tracts.

The BLM reviewed the nominated tracts and concluded that under its governing laws, regulations and approved RMP they were available for leasing. On September 25, 1996, the BLM published a notice stating that the nominated tracts would be made available for leasing at a competitive sale to be held on November 14, 1996. BLM's decision in this regard was based upon, and consistent with, the existing approved RMP.

Throughout this process Marathon had been relying upon the approved, published, RMP of the BLM. There existed at this time, however, an unpublished policy that was unknown to Marathon as it made its exploration decisions. This unpublished policy contradicted and negated the results of the approved RMPs. It originated out of a memorandum issued by Secretary Babbitt on November 1, 1993. The Secretary's policy was implemented first in Utah.[6] The Secretarial policy was then applied in Colorado by means of an oral agreement between the Colorado State Director of the BLM and representatives of the Colorado Environmental Coalition (CEC) made in the summer of 1994.

This oral agreement specified that if the CEC believed that BLM lands ought to be preserved as wilderness, then BLM would manage those lands as if they were BLM designated wilderness study areas. In particular, the BLM agreed that such lands would not be offered for oil and gas lease sales.

This agreement was so procedurally and substantively irregular that it was not published, nor even publicly

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6. *See State of Utah v. Babbitt*, 137 F.3d 1193 at 1210-11 (10th Cir. 1998) for a description of how the Secretary's policy has been applied in that State.

acknowledged, until several years after it was entered into. One internal Colorado e-mail message in the administrative record described the "policy shift" that emerged from a meeting in Washington in these terms:

> we had previously said ". . . will use decisions in the land use plans", [the State Director] was apparently asked to not allow leasing or other uses in the CEC proposed areas until a "national policy" is prepared (to be released after the election). (BLM0720).

When the Colorado State Director asked his staff to draft proposed public notices to acknowledge this policy shift, he received the following suggestions in response:

> As of March 24, 1995, the Bureau of Land Management has (illegally) adopted a policy of not offering lands for competitive oil and gas lease sale through expressions of interest within areas proposed by the Colorado Environmental Coalition (CEC) for wilderness study. (BLM0866).
>
> This policy constitutes a de facto withdrawal. The legal requirements to withdraw lands from the operation of the mineral leasing laws are not being met. (BLM0867).
>
> Paul's "illegal" addition [a reference to BLM0866, quoted above] would suit me fine, although I am obviously overruled in this thing by the state director's position. (BLM0663).

Needless to say, none of these proposed "notices" were published. Instead, the policy shift remained unknown to

Marathon until its nominated tracts were removed from the November 14, 1996, sale.

Some of the tracts nominated for leasing by Marathon were located within areas designated by the CEC as proposed wilderness areas. These same tracts had been publicly approved during the RMP process as suitable for oil and gas leasing. When representatives of the CEC reviewed the public posting of lands that were to be offered for oil and gas leasing, they discovered the overlap, called it to the attention of the BLM, and demanded that the BLM honor its oral agreement. In response, on November 6 and 13, 1996, the BLM issued two "Addenda" to its sales notice, withdrawing several of the Marathon-nominated tracts from the November 14 sale.

The effect of this process on Marathon was graphically described in an internal BLM memo:

> The situation boils down to the concessions granted by this office to a special interest group. These concessions are in turn impacting other BLM customers. The special interest group (CEC) has succeeded in convincing us to effectively withdraw lands from multiple use outside of the normal planning process and without public participation . . . Marathon has spent time and money attempting to assemble an oil and gas play in Northwest Colorado and Southwest Wyoming. They even received approval for a Development contract (2.4 million acres in Wyoming and Colorado) covering the area complete with an exploration commitment to BLM. When time came to consolidate their land position, BLM Colorado pulled parcels from the lease sale because they were contained in CEC's proposed conservation areas (A WSA by any other

> name.). . . . How sorry we are to have misled anyone by approving a development contract, requiring exploration expenses, and then hindering the performance of that contract. (BLM0696).

As described in Section A above, Marathon formally protested BLM's decision to withdraw the nominated tracts from leasing, the BLM denied the protest (App. E at 39a), Marathon sought judicial review of that decision, and the lower courts dismissed Marathon's suit for lack of standing. This petition followed.

REASONS FOR GRANTING THE WRIT

I.

THE TENTH CIRCUIT HAS SELECTIVELY DETERMINED WHEN TO APPLY THIS COURT'S *LUJAN II* AND *BENNETT* DECISIONS, AND WHEN TO IGNORE THEM.

In the proceedings before the Tenth Circuit Marathon relied upon this Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997). The Court of Appeals held, however, that "*Bennett* is not germane." (App. A at 4a).

The circuit court's decision bases this conclusion on two factors. First, it concludes that since both *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (*Lujan II* [7]), and *Bennett* were Endangered Species Act (ESA) cases, they are "inapposite." This statement implies that the Tenth Circuit regards the holding and rationale of both these cases as being confined

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7. This Court's standing decision issued in *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990), will be referred to in this petition as *Lujan I*.

solely to cases arising under that statute. Second, the circuit court based its conclusion on what it asserted to be "the absence of economic harm in this case," as opposed to the presence of economic harm in *Bennett*. (App. A at 4a).

In reaching its first conclusion, the circuit court disregarded the fact that the *Bennett* decision expressly considered plaintiffs' standing under both the ESA's citizen's suit provision and the Administrative Procedure Act (APA).[8] By ignoring that factor, the Court of Appeals evaded and failed to apply to this APA appeal the important standing guidelines articulated in this Court's *Lujan II* and *Bennett* decisions.

One of those important guidelines quantifies the weight of the standing burden shouldered by a plaintiff at the motion to dismiss stage of a case. Here the allegations contained in Marathon's pleadings explicitly delineated its harm, to the point that the government acknowledged before the district court that:

> DOI does not argue that Marathon Oil Company ("Marathon") has not suffered any harm as a result of the deletion of certain parcels from the November, 1996 BLM competitive oil and gas auction.

(Aplt. App. at 372-3).

In *Bennett* this Court held that the Ninth Circuit had improperly denied standing to plaintiffs who had met their "relatively modest" burden (at the motion to dismiss stage) of alleging that their injury is "fairly traceable" to the administrative action complained about and that it will "likely"

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8. 5 U.S.C. §§ 551-59, 701-06 (1996 & Supp. 1998).

be redressed — i.e., the agency will not impose the subject restrictions — if the action is set aside.[9]

Unfortunately, issuance of the *Bennett* decision has not eliminated the erratic treatments which lower courts have given to this Court's standing tests. Nowhere was this confusion initially more apparent than in cases where plaintiffs brought judicial challenges of Forest Service and BLM management plans. The result was a split in the circuits,[10] which this Court sought to resolve by ruling that such challenges were normally nonjusticiable because they were not yet ripe for review. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 118 S. Ct. 1665 (1998).

Significantly, although the Sixth Circuit decision in *Ohio Forestry* had concluded that the Sierra Club had standing to bring the suit and that the challenge was ripe for review, this Court reversed solely on the ripeness issue. In so doing, it based its decision upon the conclusion that "The Sierra Club thus will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain." *Id.* at 1670. Furthermore, this Court noted with approval government concessions made in briefs and oral argument that if properly presented in a complaint raising such issues, "a final decision to close a specific area to off-road vehicles" that resulted in "imminent concrete injury to a party with an interest in the use of off-road vehicles in that area" "would be immediately justiciable." *Id.* at 1673.

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9. *Bennett* at 116.

10. For example, the Eighth Circuit held that plaintiffs lack standing to bring such suits. *Sierra Club v. Robertson*, 28 F.3d 753 (8th Cir. 1994). The Ninth Circuit found standing in *Resources Ltd. v. Robertson*, 35 F.3d 1300 (9th Cir. 1994), *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705 (9th Cir. 1993), and *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699 (9th Cir. 1993).

Marathon's petition in this case presents a fact situation virtually identical to that described in *Ohio Forestry*. Here Marathon has challenged in its complaint a final BLM decision to close a specific area to oil and gas leasing. The challenged decision resulted in documented concrete injury to Marathon. Marathon is a plaintiff with a specific interest in the issuance of mineral leases in the particular area covered by the challenged BLM decision. Yet, contrary to the guidance provided in *Ohio Forestry*, the Tenth Circuit ruled that the controversy is not "immediately justiciable." Instead, by ruling that Marathon lacks standing to bring its appeal, the Tenth Circuit went so far as to conclude that the issues raised by Marathon are *never* justiciable.

In so concluding, the Tenth Circuit decision has affirmatively disregarded this Court's *Bennett* and *Ohio Forestry* decisions. Another Tenth Circuit decision, *State of Utah v. Babbitt*, 137 F.3d 1193 at 1204 (10th Cir. 1998), establishes that when that circuit chooses to apply *Bennett*, it knows the result that must be reached. In *Utah* plaintiffs' sixth cause of action asserted that defendants are imposing a "de facto wilderness management standard," in violation of FLPMA, the result of which is to preclude many uses on the affected federal lands. This particular cause of action arose out of the same Secretarial policy directives, and had the identical impact, as the Colorado action challenged by Marathon in this case. The court applied the principles articulated in *Lujan II* and *Bennett* and held:

> because general allegations of injury based on a legally cognizable right suffice at this stage, and because we must accept as true Plaintiffs' factual allegations, we conclude that Plaintiffs do have standing to bring their de facto management claim.

137 F.3d at 1215.

In this case, by contrast, the Tenth Circuit rejected Marathon's allegations of injury and the government's concession that Marathon suffered injury, and concluded: "[b]ecause of the absence of economic harm in this case, however, we believe *Bennett* is not germane." (App. A at 4a). Based upon this inexplicable finding of no economic harm, the court then proceeded to hold that since:

> [t]he jurisprudence of standing "is a highly case-specific endeavor, turning on the precise allegations of the parties seeking relief" . . . . [w]e are satisfied, however, this case falls in step with its Tenth Circuit precursors. See also *State of Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998).

(App. A at 4a).

Inasmuch as the *Utah* case involved an identical challenge to the same Secretarial policy, yet reached the opposite standing conclusion, it is impossible to ascertain from the circuit court's opinion why its decision in this case "falls in step with" the Tenth Circuit's decision in *Utah*. Rather than there being any consistency between the two decisions, what they illustrate is that the Tenth Circuit regards the decision of whether to apply *Lujan II* and *Bennett* as optional. When it chooses to acknowledge that they are germane and apposite, it finds that the plaintiff has standing; when it chooses not to apply those cases, it reaches the opposite result. It arrogates to itself the unconstrained power to make this decision by articulating a "highly case-specific" standard that is deliberately left so vague as to preclude rational analysis or predictive application.

The Tenth Circuit's "case-specific" application of standing principles in this case has turned those principles on their head. Standing principles are supposed to ensure that an individual

who is the very *object* of a law's requirement "always has standing" to challenge a prohibition imposed against him, while they erect suitable barriers against efforts of those representing broader interests to enmesh the courts in issues that ought to be more appropriately addressed in the political and administrative arenas.[11]

It was the inversion of these principles that was addressed by this Court in *Bennett*. The decision of the Tenth Circuit to selectively determine when *Bennett* is "germane," and when it is not, has allowed the Tenth Circuit to conclude that broadly based organizations (such as the State of Utah) have standing to challenge the Secretary's imposition of a *de facto* wilderness management regime, but individual entities (such as Marathon) which suffer direct injuries from such management decisions, do not.

The implications of the Tenth Circuit's decision in this case are profound. That decision indicates that this Court's standing decisions continue to be applied in wildly erratic fashions, even within the same circuit. The case illustrates an unfortunate tendency to utilize this Court's standing decisions on a selective basis, in order to avoid the merits of cases brought by politically unpopular litigants (such as oil and gas companies) in the context of popular causes (such as wilderness

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11. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881-82 (1983) ("[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*. Thus, when an individual who is the very *object* of a law's requirement or prohibition seeks to challenge it, he always has standing. . . .")

protection).[12] The holding of the Tenth Circuit, by insulating the Interior Department from judicial review, frees that agency from restrictions imposed by law. It thereby allows the Secretary of the Interior to claim and exercise a degree of discretion in leasing matters that (as he contends in his briefs) is "absolute." All of these unfortunate consequences occur because the decision of the Tenth Circuit violates this Court's guidance and precedents.

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12. As academic commentators have noted:

> To date, however, the two [*Lujan*] cases have not significantly affected the ability of public interest environmental litigants to convince the courts to reach the merits in public lands cases. . . . Indeed, the litigants most frequently thrown out of court on standing grounds subsequent to the *Lujan* cases have been those seeking to challenge restrictions on development.

George C. Coggins and Robert L. Glicksman, "*Evolution of Federal Public Land and Resources Law*," Rocky Mtn. Min. L. Special Inst., Public Land Law II (Nov. 1997); this has been a recurring problem associated with standing cases. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 3-18, at 130 (2d ed. 1988) ("In the guise of causality analysis, federal courts will engage in an unprincipled effort to screen from their dockets claims which they substantively disfavor. Indeed, the causation requirement has come under increasing attack from commentators for being what Justice Brennan has termed 'no more than a poor disguise for the Court's view of the merits of the underlying claims.' ")

II.

BY SELECTIVELY APPLYING THIS COURT'S STANDING DECISIONS, THE TENTH CIRCUIT IS EVADING ITS RESPONSIBILITY TO REVIEW CHARGES OF ADMINISTRATIVE IMPROPRIETY AND ILLEGALITY.

The allegations asserted by Marathon against the Secretary of the Interior and the BLM in its Complaint are quite serious. They are also documented in detail in the administrative record of the case, large portions of which were obtained as a consequence of BLM's providing internal e-mail correspondence in response to Marathon's Freedom of Information Act request. A very brief sampling of this record is quoted in Marathon's Statement of Facts set out above.

In essence, Marathon's allegations (which must, at this stage of the proceedings, be presumed to be true) and this administrative record outline a two-track decision-making process. One track consisted of an elaborate, multi-year process, costing literally millions of public dollars, involving numerous inventories, studies, EISs, and substantial public input. That process was mandated by a variety of applicable laws, most notably FLPMA and NEPA,[13] and was carried out with scrupulous care by the BLM. The outcome of this public, statutorily-mandated process was a formal BLM decision that the lands at issue in this case were suitable for oil and gas leasing and were to be offered at a public, competitive, lease sale to be held on November 14, 1996.

The second decision-making track consisted of private meetings between representatives of a single special-interest

13. National Environmental Policy Act of 1969, 42 U.S.C. § 4332 *et seq.* (1994 & Supp. 1999).

organization (the CEC) on the one hand, and the Secretary of the Interior and the then State Director of the Colorado office of the BLM, on the other.

This unpublished decision-making process blindsided Marathon after Marathon had based a number of its exploratory decisions and the expenditure of over $3.5 million on the results of the BLM's publicized decisions. Tracts that had been identified for leasing as a consequence of Marathon's expenditures were pulled off the sales list, and made indefinitely unavailable for leasing by virtue of the application of an unpublished decision.

Today, over five years after the policy was secretly adopted, it remains in full force and effect. The sole criterion for imposition of this *de facto* wilderness management regime was — and remains — whether a private organization has designated an area as part of its proposed wilderness areas. Where — as in this case — the CEC designation conflicts with a prior BLM designation, BLM allows the CEC designation to trump the outcome of its own public RMP process.

The Tenth Circuit decision means that even if Marathon proves all of this true, Marathon nevertheless lacks standing to challenge the decision. In his evaluation of *Lujan II* published shortly after it was issued, Professor Cass Sunstein addressed the question of whether the opinion of the Court in that case ought to be read as radically altering traditional understandings of standing in administrative cases. He concluded that it should not:

> A contrary conclusion would produce surprising results. It would mean that Article III imposed a constitutional obstacle to most ordinary

> administrative law cases. In the usual case, a litigant contends that an agency has failed to follow some procedural requirement — by holding inadequate hearings, failing to give notice, meeting with private people, or attending to a statutorily irrelevant factor. In all such cases, it might well be said, under the apparent standard in *Lujan*, that the redressability requirement has not been met. In such cases, it is entirely "speculative" whether a decree in the defendant's favor will remedy the alleged injury. *Lujan* cannot be understood to say that these conventional cases have all of a sudden become nonjusticiable.[14]

This Court's *Bennett* and *Ohio Forestry* decisions established that in this regard Professor Sunstein's analysis of *Lujan II* was correct: conventional administrative law cases have not all of a sudden become nonjusticiable. However, the Tenth Circuit's decision that *Bennett* is not germane to this appeal has produced exactly the "surprising result" that Professor Sunstein warned against. The Tenth Circuit has taken a conventional administrative law case and made it nonjusticiable.

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14. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 208-9 (1992).

III.

DEPRIVING MARATHON OF STANDING TO CHALLENGE THE SECRETARY'S LEASING DECISIONS FREES THE SECRETARY FROM LEGISLATIVE CURBS ON THE EXERCISE OF HIS DISCRETION.

By denying Marathon standing, the lower courts' decisions necessarily pose the question: under what circumstances are the Department's leasing decisions subject to judicial review? The government has sought to answer this question in its briefs below. Those briefs defend the courts' decisions on the ground that a Secretary of the Interior possesses "absolute authority . . . to refuse to lease federal lands," (Answer Br. at 41) consequently no one possesses standing to challenge leasing decisions, and no court is empowered to review them.

In oral argument, one member of the Tenth Circuit panel asked counsel for the government whether this conclusion would hold true even if it turned out that the decision in question were obtained as a result of outright corruption or political influence. The government's response was that in such a case, while the Attorney General could prosecute the decision-maker, nevertheless, no private party would have standing to challenge the legality of the decision.

The Secretary has thus confirmed that, in his view, the effect of the circuit court's decision is to replace the Constitution's delegation to Congress of the "power to dispose of and make all needful Rules and Regulations respecting the . . . property belonging to the United States," U.S. Const. art. IV, § 3, cl. 2, with the executive branch's assertion of an "absolute authority" vested in the Secretary. The Secretary is claiming that — notwithstanding the APA — no one has

standing to challenge the manner in which he exercises the discretion granted to him.

The district court accepted this conclusion when it held:

> only an order of this court compelling the executive branch to make land available for competitive leasing . . . would likely redress Marathon's claimed injuries. This I do not have the power to do.

966 F. Supp. at 1026. (App. B at 9a). This reasoning holds that since the Secretary has the ultimate power to decide whether or not to lease lands, and since that power is a discretionary one, there is nothing that a court can do to redress Marathon's injury.

This Court has recently explained the fallacy of the district and circuit court's logic on this point in *Federal Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998):

> Agencies often have discretion about whether or not to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground. If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case — even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason. Thus respondents' "injury in fact" is "fairly traceable" to the FEC's decision not to issue its complaint, even though the FEC might reach the same result

> exercising its discretionary powers lawfully. For similar reasons, the courts in this case can "redress" respondents' "injury in fact."

Until the decisions of the lower courts in this case, Secretarial and BLM decisions regarding the leasing of public lands were required to conform to the procedures and substance dictated by Congress in enacted legislation such as FLPMA.

The constraints imposed by FLPMA on how the Secretary is supposed to formulate and implement his leasing decisions are detailed and numerous. For example, § 202(a) of FLPMA, 43 U.S.C. § 1712(a) (1986), requires the Secretary, "with public involvement and consistent with the terms and conditions of this Act," to "develop, maintain, and when appropriate, revise land use plans which provide by tracts and areas for the use of the public lands."

Secretarial decisions issued to implement land use plans developed in accordance with FLPMA's requirements must conform with particularized guidelines, such as those contained in 43 U.S.C. § 1712(e)(2) (1986):

> Any management decision or action pursuant to a management decision that excludes (that is, totally eliminates) one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more shall be reported by the Secretary to the House of Representatives and the Senate.

The term "principal or major uses" is defined in 43 U.S.C. § 1702(l) (1986) to include "mineral exploration and production." The BLM's action challenged in this appeal eliminates mineral exploration and production for more than

one hundred thousand acres and it has already lasted well over two years, yet it has never been reported to the Congress.

Section 603 of FLPMA, 43 U.S.C. § 1782 (1986 & Supp. 1999), contains Congress' specific directions to the Secretary concerning the manner in which lands administered by the BLM were to be reviewed for wilderness study. That section constitutes the exclusive source of authority for the Secretary to impose restrictive land management policies upon lands for wilderness study purposes. It allocated 15 years from October 26, 1976, in which the Secretary was required to complete the process of identifying lands having wilderness characteristics. As to those tracts of land so identified — and only those tracts — the Secretary was directed to report to the President his recommendation as to their suitability or nonsuitability for permanent preservation under the provisions of the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1985 & Supp. 1999). The BLM's decision in this case extends this process indefinitely, thereby violating FLPMA's 15-year deadline.

Section 204 of FLPMA, 43 U.S.C. § 1714 (1986 & Supp. 1999), authorized the Secretary "to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section." Subsections (b) and (c) of § 204, 43 U.S.C. §§ 1714(b)-(c) (1986), require that whenever the Secretary shall propose a withdrawal on his own motion, he must publish a notice in the Federal Register and, if the withdrawal aggregates 5,000 acres or more, notify both Houses of Congress of such withdrawal and furnish a report containing a detailed analysis as specified in subsection (c)(2) of § 204, 43 U.S.C. § 1714(c)(2) (1986). Subsection (h) requires that before the Secretary can make any new withdrawals, he must provide an opportunity for a public hearing. 43 U.S.C. § 1714(h) (1986). The BLM's decision here

withdraws lands from mineral leasing without following any of these procedures.

Section 302 of FLPMA, 43 U.S.C. § 1732 (1986 & Supp. 1999), requires: "The Secretary *shall* manage the public lands under principles of multiple use and sustained yield, *in accordance with the land use plans* developed by him under section 1712 of this title. . . ." (emphasis added) In order to implement this mandatory provision, 43 C.F.R. § 1610.5-3 (1998) mandates that, "[a]ll future resource management authorizations and actions . . . *shall* conform to the approved plan" (emphasis added). 43 C.F.R. §§ 1610.2, 1610.5-5 and 1610.5-6 (1998) further dictate that the approved plan may not be amended or revised without formal public involvement, inter-agency coordination and submission to the NEPA process. Accordingly, the Secretary's actions are required by law to conform to the approved RMP until such time as the RMP is amended or revised and approved in accordance with the applicable regulations.

The BLM carefully complied with all aspects of these detailed requirements in reaching its decision to post Marathon's nominated lands for lease sale. The Secretary discarded and rejected all these requirements when he imposed the decision that is challenged in this case. If Marathon has no standing to bring a judicial challenge of that decision, then who does? If no one has standing to challenge the Secretary's disregard for legislatively imposed constraints on his leasing decisions, then he will have no more need to adhere to legislated constraints in the future than he has had in this case.

IV.

THE TENTH CIRCUIT DECISION APPLIED TOO STRINGENT A REDRESSABILITY TEST.

In applying this Court's "redressability" prong of the standing test, the Tenth Circuit applied a more stringent standard than ought to be applied under the facts posed by this case.

The district court in this case premised its decision on what amounts to a finding of fact that "*only* an order of this court *compelling* the executive branch to make land available for competitive leasing . . . would likely redress Marathon's claimed injuries." (App. B at 9a (emphasis added)). This finding of fact is unsupported by any facts pled in Marathon's complaint or contained in the administrative record. Instead, it is directly contradicted by those allegations and facts.

Marathon alleged that the lands it seeks to lease were subjected to a lawful and appropriate review by BLM, and found to be suitable for leasing. Marathon next alleged that the Secretary's policy intervened, resulting in withdrawal of those tracts from the sale list. Marathon challenged the Secretary's policy as being arbitrary, capricious and contrary to law. Finally, Marathon alleged that a judicial declaration of the invalidity of the Secretary's policy, combined with a prohibition against its imposition, would result in the lands Marathon seeks being once more made available for lease, thus redressing its injury. Marathon acknowledges that it cannot prove with absolute certainty that the Secretary will act lawfully once the courts declare what the law is in this situation, but Marathon believes that it has carried its burden of establishing that it is *likely* that a judicial prohibition against application of the Secretary's illegal policy will result in return to the lawful

practices actually followed by BLM prior to application of the challenged policy.

Marathon raised this as its first point on appeal before the Court of Appeals. The circuit court decision understood this, and correctly summarized Marathon's contention. (App. A at 3a). Having identified this key issue, the panel decision then mentioned it no more.

The only consideration given by the circuit court to the facts pled in Marathon's complaint or contained in the administrative record is to erroneously state that they frame a case where there is "an absence of economic harm." (App. A at 4a). In substituting their own views of the facts for those actually alleged by Marathon and actually contained in the administrative record, the district and circuit court decisions both violate *Bennett's* requirements and apply a redressability test that is much more stringent than the "relatively modest" one that is supposed to apply at this stage.

The district and circuit court decisions also fail to acknowledge the importance of the fact that Marathon has been directly injured by the administrative decision it challenges. Professor Sunstein has noted that in *Lujan II*:

> the Court added that the standing issue will often be affected by "whether the plaintiff is himself an object of the action (or forgone action) at issue." If the plaintiff is an object, the three requirements will ordinarily be met. But when an "injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed." . . . The Court suggested that in such cases standing "is ordinarily 'substantially more difficult' to establish." The Court had implicitly drawn this

> distinction in *Allen v. Wright*, [468 U.S. 737 (1984)], but *Lujan* was the first case explicitly to mark out the categories.

Sunstein, *supra*, at 199.

The *Lujan II* decision pointed out in its famous footnote 7 that this distinction is particularly important when a plaintiff asserts violation of its procedural rights:

> The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered. . . .

504 U.S. at 572 n.7.

In sharp contrast to the method followed by the district and circuit courts in this case, this Court in *Bennett* followed these guidelines by examining closely the allegations contained in the complaint. It also examined in detail the practical effect which the challenged administrative action had on the concrete interests of the plaintiffs. As a consequence, as one lower court has properly held, where the plaintiff has been injured in a concrete and immediate fashion, the "relatively modest" burden imposed by the redressability test is met when the facts outlined in the complaint demonstrate "that 'but for' defendants' intervention, plaintiff . . . already would have been allowed" to undertake the activity which defendants' intervention

precluded. *Bonnichsen v. United States*, 969 F. Supp. 628, 635 (D. Or. 1997).

Neither the district nor the circuit court in this case provided any explanation of why it concluded that Marathon failed to show a substantial likelihood that its injury will be redressed by a favorable decision. Each further erred when it rejected the proposition that this Court has adopted differing standards for its redressability test, dependent upon whether the agency action at issue directly, imminently and concretely injures the particularized interests of the plaintiff.[15]

This conclusion directly conflicts with *Lujan II*.[16] This point was re-emphasized by the holding in *Bennett*, where the

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15. The district court's ruling on this point stated: "It was not the Supreme Court's holding, however, that there is a difference between a third party complaining of a government action directed at someone else and a first party directly affected where all the necessary parties are before the court." (App. B at 8a).

16. This Court made its point twice. In part II the majority stated:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation of *someone else*, much more is needed.

504 U.S. at 561-62.

(Cont'd)

plaintiffs suffered direct injury to their own economic interests. 520 U.S. 154 at 167.

The distinction between a plaintiff whose injury is direct, concrete and particularized and one whose injury is shared by the population at large lies at the core of the doctrine of standing:

> I suggest that courts need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large. . . .
>
> Unless the plaintiff can show some respect in which he is harmed *more* than the rest of us . . . he has not established any basis for concern that the majority is suppressing or ignoring the rights of a minority that wants protection, and thus has not established the prerequisite for judicial intervention.[17]

(Cont'd)

Later, in part IV the point is restated in footnote 7, quoted above.

17. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881-82, 894-95 (1983) (citations omitted).

CONCLUSION

Here Marathon's injury is a very particularized one, arising from the fact that it is "the very *object* of a law's requirement or prohibition." Marathon therefore fits squarely within that group of plaintiffs who, when they seek to challenge an agency's action as being prohibited by law, should "always have standing."

The lower courts' rulings in this case indicate how far afield those courts have strayed in interpreting and applying this Court's standing decisions. By failing to apply this Court's *Bennett* and *Lujan II* decisions, the district and circuit courts have abrogated their responsibility to perform their historic function of determining whether administrative actions that injure private parties are consistent with applicable law.

When the courts refuse to perform their constitutional duty of reviewing agency actions in proper cases the effect is to free the agency from the policies and procedures mandated by Congress.

This Court should grant the petition to ensure that the lower courts in this case — and in innumerable others like it — apply constitutional standing principles to preserve, rather than undermine, the proper separation of powers among the three branches of government.

Respectfully submitted,

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